

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ZOOM ELECTRIC, INC.,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 595,
and DOES 1-20,

Respondents.

No. C 11-1699 CW

ORDER GRANTING
COUNTER-
PLAINTIFFS' MOTION
FOR ATTORNEYS'
FEES AND COSTS
(Docket No. 137)

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 595;
ALAMEDA COUNTY ELECTRICAL
INDUSTRY SERVICE CORPORATION;
IBEW LOCAL 595 HEALTH & WELFARE
TRUST FUND; IBEW LOCAL 595
PENSION TRUST FUND; IBEW LOCAL
595 MONEY PURCHASE PENSION TRUST
FUND; IBEW LOCAL 595 VACATION
FUND; IBEW LOCAL 595 APPRENTICE &
TRAINING FUND; ELECTRICAL
CONTRACTORS TRUST; CONTRACT
ADMINISTRATION FUND; LABOR
MANAGEMENT COOPERATION FUND;
VICTOR UNO; and DON CAMPBELL,

Counter-Plaintiffs,

v.

ZOOM ELECTRIC, INC.; VEIKO HORAK;
B-SIDE, INC.; and DOES ONE
through TEN, inclusive,

Counter-Defendants.

1 B-SIDE, INC.,

2 Cross-Claimant,

3 v.

4 VEIKO HORAK, doing business as
5 ZOOM ELECTRIC,

6 Cross-Defendant.

7 _____/

8 Counter-Plaintiffs International Brotherhood of Electrical
9 Workers, Local 595 (the Union), the employee benefit trust funds,
10 Alameda County Electrical Industry Service Corporation (EISC),
11 which is the collection agent for the trust funds, and Victor Uno
12 and Don Campbell, who are trustees for the trust funds and
13 officers of EISC, move for an award of attorneys' fees and costs
14 incurred in prosecuting the instant case. In the present motion,
15 Counter-Plaintiffs seek entry of such an award against Counter-
16 Defendant B-Side, Inc. only.¹ B-Side opposes their motion. The
17 facts and history of this case are set forth in detail in the
18 Court's Order of February 8, 2013. The Court took the motion
19 under submission on the papers. Having considered the papers
20 filed by the parties, the Court GRANTS Counter-Plaintiffs' motion.

21 DISCUSSION

22 I. Entitlement to Attorneys' Fees

23 Counter-Plaintiffs move under section 502 of the Employee
24 Retirement Income Security Act (ERISA) for attorneys' fees and
25 costs incurred in prosecuting their ERISA claim. They also move
26 under California Labor Code section 218.5 and California Code of

27 _____

28 ¹ Counter-Defendants Vieko Horak and Zoom Electric, Inc.
(ZEI) have both filed for bankruptcy.

1 Civil Procedure section 1021.5 for fees and costs incurred during
2 the prosecution of their entire case, including their first cause
3 of action to confirm and enforce the Joint Administrative
4 Committee (JAC) award for "Payment to workers on the IBEW 595
5 Available for Work list of 1648 hours totaling \$116,299.36" and
6 "Payment on behalf of employees of Zoom Electric, Inc. to the
7 IBEW, 595 Trust Funds totaling \$42,963.36 for hours worked in
8 violation of the" Project Labor Agreement (PLA). Counter-
9 Plaintiffs also include in their motion a request for fees and
10 costs incurred in filing the instant motion.

11 "B-Side concedes that it is liable for the portion of
12 attorney's fees and costs that are attributable to . . . the ERISA
13 violation alleged in the Second Cause of Action in the Second
14 Amended Counter-Complaint" (2ACC). Opp. at 1 n.2. B-Side also
15 concedes that it is liable for part of Counter-Plaintiffs'
16 attorneys' fees and costs related to the first cause of action
17 under California Labor Code section 218.5. Opp. at 4.
18 Specifically, B-Side concedes that it is liable for fees and costs
19 that are attributable to the portion of the JAC award requiring
20 payment on behalf of employees of ZEI. Id. Thus, B-Side disputes
21 only that Cross-Plaintiffs are entitled to fees and costs
22 attributable to the portion of the JAC award requiring payment to
23 workers on the available for work list. B-Side also seeks to
24 limit its liability to fees and costs incurred after the 2ACC was
25 filed, joining B-Side to this action. B-Side has not challenged
26 Counter-Plaintiffs' entitlement to fees and costs incurred in the
27 filing of the instant motion.
28

1 A. Liability for fees and costs attributable to the portion
2 of the JAC award requiring payment to workers on the
3 available to work list

4 Counter-Plaintiffs seek an award of fees and costs for this
5 portion of their fees under both California Labor Code section
6 218.5 and California Code of Civil Procedure section 1021.5.

7 Under section 1021.5, which codifies the private attorney
8 general doctrine, a court may, under certain circumstances, "award
9 attorneys' fees to a successful party against one or more opposing
10 parties in any action which has resulted in the enforcement of an
11 important right affecting the public interest." Fees may be
12 awarded under this code section if three requirements are met:

13 (a) a significant benefit, whether pecuniary or
14 nonpecuniary, has been conferred on the general public
15 or a large class of persons,

16 (b) the necessity and financial burden of private
17 enforcement . . . are such as to make the award
18 appropriate, and

19 (c) such fees should not in the interest of justice be
20 paid out of the recovery, if any.

21 Cal. Civ. Proc. Code § 1021.5. "The burden is on the claimant to
22 establish each prerequisite to an award of attorney fees under
23 section 1021.5." Ebbetts Pass Forest Watch v. Dep't of Forestry &
24 Fire Prot., 187 Cal. App. 4th 376, 381 (2010) (citation omitted).
25 "The decision whether the claimant has met his burden of proving
26 each of these prerequisites and is thus entitled to an award of
27 attorney fees under section 1021.5 rests within the sound
28 discretion of the trial court and that discretion shall not be
disturbed on appeal absent a clear abuse." Ryan v. California
Interscholastic Fed'n, 94 Cal. App. 4th 1033, 1044 (2001).

B-Side argues that it was not an "opposing party" for much of
this litigation because it was not added as a party until after

1 Counter-Plaintiffs filed the 2ACC. However, B-Side provides no
2 authority that section 1021.5 requires that it was an opposing
3 party for the entirety of the litigation to be responsible for
4 attorneys' fees or that such fees should be limited to that time
5 period. California courts have construed "the term 'opposing
6 party' as used in section 1021.5 to mean a party whose position in
7 the litigation was adverse to that of the prevailing party."

8 Nestande v. Watson, 111 Cal. App. 4th 232, 240-241 (2003).

9 "Simply put, an 'opposing party' within the meaning of section
10 1021.5 is a losing party." Id. Here, B-Side indisputably took a
11 position adverse to that of Counter-Plaintiffs and was thus an
12 opposing party within the meaning of the statute.

13 Counter-Plaintiffs have met their burden to show that a
14 significant benefit was conferred on the general public or a large
15 group of people through the results that they obtained. B-Side
16 argues that the "general public are not members of labor unions
17 that participate from time-to-time in project labor agreements."
18 Opp. at 5. However, as Counter-Plaintiffs correctly point out,
19 the general public does benefit from a ruling that general
20 contractors are responsible for this type of malfeasance by their
21 unlicensed subcontractors because it "spares the public from
22 bearing the costs of supporting unpaid or improperly paid
23 workers." Reply at 11. It also effectuates the legislative
24 intent in California Labor Code section 2750.5 by helping to "end
25 the 'subterranean economy' where contractors hire unlicensed
26 subcontractors and pay them in cash, resulting in the 'loss of
27 large sums in taxes, employee social insurance contributions, and
28 employee pension funds,'" or colluding to cheat workers out of

1 their due wages and benefits. Sanders Constr. Co., Inc. v. Cerda,
2 175 Cal. App. 4th 430, 435 (2009); see also Folsom v. Butte Cnty.
3 Assn. of Gov'ts., 32 Cal. 3d 668, 671 (1982) (recognizing, in a
4 case in which the defendants ultimately agreed to establish four
5 transit systems, that the plaintiffs "vindicated legislative
6 intent and thus benefited not only those who are transit-dependent
7 in Butte County but the citizenry as a whole").

8 B-Side also argues that Counter-Plaintiffs were sufficiently
9 motivated by their own pecuniary interest to pursue these claims
10 on their own. In considering this factor, courts have recognized
11 that "an award is appropriate where the cost of the legal victory
12 transcends the claimant's personal interest; in other words, where
13 the burden of pursuing the litigation is out of proportion to the
14 plaintiff's individual stake in the matter." Ryan, 94 Cal. App.
15 4th at 1044; see also Conservatorship of Whitley, 50 Cal. 4th
16 1206, 1220-21 (2010) (noting that the relevant inquiry here
17 focuses on the litigant's objective financial incentives to bring
18 the litigation, not the actual recovery attained or other
19 subjective motivations). This is because "Code of Civil Procedure
20 section 1021.5 is intended to provide an incentive for private
21 plaintiffs to bring public interest suits when their personal
22 stake in the outcome is insufficient to warrant incurring the
23 costs of litigation." Id. at 1221 (internal quotation marks and
24 citation omitted).

25 B-Side contends that the JAC award was for a sizable amount
26 of money, that Counter-Plaintiffs had the resources to prosecute
27 this claim and that they went after B-Side "to find a deep
28 pocket," not to vindicate a public right. Opp. at 6. However, as

1 noted above, the results achieved and Counter-Plaintiffs'
2 subjective motivations are irrelevant to this inquiry. Further,
3 that Counter-Plaintiffs had the resources to prosecute their claim
4 is also irrelevant. See Am. Fed'n of Labor v. Emp't Dev. Dep't,
5 88 Cal. App. 3d 811, 822 (1979) ("the code does not make financial
6 status of the prevailing party the criteria for awarding fees").
7 In addition, although this portion of the JAC award, \$116,299.36,
8 collectively was a significant amount of money, it was owed to a
9 large number of people who were individually owed small amounts of
10 lost wages that it was unlikely that they would pursue on their
11 own. The Court finds that, under these circumstances, "the
12 additional carrot of shifted fees" is warranted "to ensure that
13 the public interest will be vindicated." Unocal Corp. v. United
14 States, 222 F.3d 528, 544 (9th Cir. 2000). Finally, in the
15 interest of justice, attorneys' fees should not be paid out of the
16 small recoveries that were achieved on behalf of the various
17 individuals on the available for work list.

18 Accordingly, Counter-Plaintiffs have met their burden to show
19 that they are entitled under section 1021.5 to recovery of this
20 portion of their fees. Because Counter-Plaintiffs are eligible to
21 receive attorneys' fees under section 1021.5, the Court need not
22 address whether they may also do so under section 218.5.

23 B. Special circumstances

24 B-Side seeks to use the doctrine of special circumstances to
25 limit its liability for attorneys' fees and costs to only that
26 incurred by Counter-Plaintiffs after the 2ACC was filed and B-Side
27 was joined in this action. The parties agree that, under both
28 federal and state law, an award of attorneys' fees can be denied

1 if special circumstances would render such an award unjust. Opp.
2 at 2; Reply at 6 n.5. The parties also agree that the doctrine of
3 special circumstances is narrowly applied. Opp. at 2; Reply at 6
4 n.5.

5 B-Side contends that, because it "had nothing to do with the
6 filing or the prosecution of this action until B-Side was served"
7 with the 2ACC, it should not be required to pay for fees and costs
8 that Counter-Plaintiffs incurred prior to that time. Opp. at 3.
9 It also argues that Counter-Plaintiffs made a "tactical decision"
10 to delay in bringing claims against B-Side. Id.

11 The Court finds that B-Side's contentions do not amount to
12 special circumstances that justify denial of attorneys' fees in
13 their entirety or for the time period before it was served.
14 Counter-Plaintiffs' efforts in the prosecution of their claims
15 against ZEI and Horak were an integral part of the prosecution of
16 their claims against B-Side as well and, had they not already
17 expended the efforts that they did during that phase of the
18 litigation, they would have been required to do so after B-Side
19 was made a party.

20 II. Reasonableness of Fees

21 "The most useful starting point for determining the amount
22 of a reasonable fee is the number of hours reasonably expended on
23 the litigation multiplied by a reasonable hourly rate."

24 Nadarajah v. Holder, 569 F.3d 906 (2009) (quoting Hensley v.
25 Eckerhart, 461 U.S. 424, 433-34 (1983)); see also Ctr. for
26 Biological Diversity v. Cnty. of San Bernardino, 188 Cal. App. 4th
27 603, 616 (2010). The parties do not dispute that the lodestar
28 amount properly includes expenses ordinarily billed to a client

1 and not included in the hourly rate. "The party seeking an award
2 of fees should submit evidence supporting the hours worked and
3 rates claimed." Hensley, 461 U.S. at 433. "Where the
4 documentation of hours is inadequate, the district court may
5 reduce the award accordingly." Id.

6 A. Reasonable hourly rate

7 "The reasonable market value of the attorney's services is
8 the measure of a reasonable hourly rate." MBNA America Bank, N.A.
9 v. Gorman, 147 Cal. App. 4th Supp. 1, 13 (2006) (citing Ketchum v.
10 Moses, 24 Cal. 4th 1122, 1139 (2001)). The parties dispute the
11 reasonable market value for the services of Counter-Plaintiffs'
12 counsel, the law firm of Leonard Carder LLP.

13 Counter-Plaintiffs assert that reasonable market rates in
14 labor and employment cases are \$675 per hour for partners, between
15 \$300 and \$400 per hour for associates, and between \$180 and \$225
16 per hour for law clerks and paralegals. In support of this, they
17 submit two declarations from Philip C. Monrad, a partner at
18 Leonard Carder, with twenty-two years of experience, including
19 sixteen years of experience practicing labor and employment law.
20 Monrad Decl. ¶ 2. Mr. Monrad attests that, in his "experience and
21 knowledge of the market rates for labor and employment attorneys,
22 as well as paralegals and law clerks, the hourly rates sought
23 . . . reflect[] the market rates for the services rendered by the
24 attorneys, paralegals, and law clerks." Monrad Reply Decl. ¶ 3;
25 see also Monrad Decl. ¶ 3. He also states that he and members of
26 Leonard Carder previously have been awarded these rates and that,
27 in his experience as a labor and employment lawyer, such rates
28 have been found to be reasonable. Id. He cites this Court's

1 decision in Gilmer v. Alameda-Contra Costa Transit Dist., Case No.
2 08-1586, Docket No. 269, a collective action brought under the
3 Fair Labor Standards Act in which this Court granted the
4 plaintiffs' unopposed motion for approval of a settlement
5 agreement and request for attorneys' fees and costs for Leonard
6 Carder. In Gilmer, the Court described rates sought by Leonard
7 Carder as reasonable market rates, based on a declaration
8 submitted by Mr. Monrad so asserting. Id. at 5. Counter-
9 Plaintiffs have also submitted copies of Leonard Carder's billing
10 records which show that it charged them between \$235 and \$250 per
11 hour for attorneys' time and \$150 per hour for law clerks and
12 paralegals. Hwang Decl. ¶ 7, Ex. B.

13 B-Side responds, without citation to any supporting legal
14 authority, that the evidence provided by Counter-Plaintiffs is
15 insufficient and "submits that comparing market rates in class
16 action and market rates in this action is an apples and
17 watermelons comparison." Opp. at 8 (errors in original). B-Side
18 does not argue that the appropriate rate is that contained in
19 Leonard Carder's billing records. See Ctr. for Biological
20 Diversity, 188 Cal. App. 4th at 619 (that a "firm accepts reduced
21 rates from plaintiffs . . . does not affect its right to seek
22 reasonable market rates"). Instead, it contends that the Court
23 should use the billing rate that its counsel, Last & Faoro, has
24 been charging it, \$325 per hour. In support of this argument, B-
25 Side offers the declaration of its attorney, William C. Last, Jr.,
26 a partner at Last & Faoro. Mr. Last attests that he has been a
27 member of the California bar since 1978 and that his "practice has
28 consisted primarily of construction related litigation." Last

Decl. ¶ 2. He further states that the hourly rate charged by his firm is "consistent with the market rates for similar services charged by attorneys in the San Francisco Bay Area." Id. at ¶ 3.

The evidence provided by Counter-Plaintiffs is sufficient to establish that the rates requested are reasonable market rates for the services provided. See Quinones v. Chase Bank USA, N.A., 2011 U.S. Dist. LEXIS 145199 (S.D. Cal.), at *8 ("The moving party satisfies its burden through its own affidavits and no additional evidence is needed.") (citing Gorman, 147 Cal. App. 4th Supp. at 13). Mr. Monrad's declaration does not provide the hourly rate for representation in class or collective action cases only and instead provides evidence of the market rates charged by labor and employment attorneys in general. Although B-Side's counsel may have charged it a lower rate, it has provided no evidence that this lower rate was in keeping with the prevailing market rate for employment and labor attorneys. Instead, it attests that it is consistent with the services of attorneys who practice construction law, which is irrelevant. Accordingly, the Court finds that Counter-Plaintiffs' requested hourly rates are reasonable.

B. Hours reasonably expended

B-Side contends that the fee motion should be denied because Counter-Plaintiffs have failed to provide "a statement describing the manner in which time records were maintained." Opp. at 7 (citing Civil Local Rule 54-5(b)(2)). However, Counter-Plaintiffs have stated that Leonard Carder tracked its time using "detailed computerized contemporaneous time records" and that it utilized

1 "unique client reference numbers." Hwang Decl. ¶¶ 6, 8; see also
2 Hwang Reply Decl. ¶ 6.

3 B-Side does not seek to exclude any particular hours that
4 Counter-Plaintiffs have included in their billing statement and
5 for which they seek compensation. Instead, it argues that it
6 should only be required to pay an amount of the fees and costs
7 that is proportionate to the amount of damages that Counter-
8 Plaintiffs were awarded for the claims for which they can recover
9 fees and costs. However, as discussed above, the Court finds that
10 they can recover fees and costs related to all of their claims.
11 Further, even if the Court had found that Counter-Plaintiffs were
12 not entitled to recover fees and costs attributable to the portion
13 of the JAC award requiring payment to workers on the available to
14 work list, "fees need not be apportioned when incurred for
15 representation of an issue common to both a cause of action for
16 which fees are permitted and one for which they are not." Akins
17 v. Enterprise Rent-A-Car Co., 79 Cal. App. 4th 1127, 1133 (2000).
18 Here, based on the history of the litigation before this Court,
19 the covered and uncovered portions of the first cause of action
20 were both factually and legally intertwined. Thus, the research
21 and work that Counter-Plaintiffs' counsel devoted to one cannot be
22 separated from that devoted to the other and can be properly found
23 to have been reasonably incurred in prosecution of the covered
24 portion. Accordingly, the Court finds no basis for apportionment
25 of the fees and costs here.
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1 Thus, the Court concludes that, prior to the instant motion,
2 Counter-Plaintiffs reasonably expended 410.4 attorney hours² and
3 18.1 law clerk and paralegal hours in this litigation. This
4 includes: 37.9 attorney hours at a rate of \$675 per hour; 269.6
5 attorney hours at a rate of \$400 per hour; 102.9 attorney hours at
6 a rate of \$300 per hour; 12.3 law clerk hours at a rate of \$180
7 per hour; 0.20 paralegal hours at a rate of \$225 per hour; 2.5
8 paralegal hours at a rate of \$200 per hour; and 3.1 paralegal
9 hours at a rate of \$180 per hour. The total cost of these hours
10 at the rates found reasonable above is \$167,609.50.

11 The Court also finds that the Counter-Plaintiffs have shown
12 that they reasonably expended 36.7 attorney hours and 9.1 law
13 clerk and paralegal hours in the preparation of the instant motion
14 through February 28, 2013. This includes: 9.4 attorney hours at a
15 rate of \$675 per hour; 27.3 attorney hours at a rate of \$300 per
16 hour; and 9.1 paralegal hours at a rate of \$200 per hour. See
17 Hwang Reply Decl. ¶ 5, Exs. A & B. The total cost of these hours
18 is \$16,355.00. Counter-Plaintiffs, however, have not made a
19 sufficient showing for hours expended in March 2013. Although
20 Counter-Plaintiffs' counsel states that she estimates that an
21 additional twenty-five hours of attorney time was spent on this
22 motion during the month of March, she bases this estimate "on the
23 time and billing records for the time spent on this motion during
24 February 2013" rather than those for March 2013. Hwang Reply
25 _____

26 ² This number reflects the hours contained in Exhibit A to
27 the Hwang declaration. See Hwang Decl. ¶ 3 & Ex. A. The Court
28 notes that Counter-Plaintiffs appear to have inadvertently added
an additional half hour of attorney time elsewhere. See Hwang
Decl. ¶ 4.

1 Decl. ¶ 5. Further, because the Court took the motion under
2 submission on the papers and vacated the hearing, the Court does
3 not award the five additional hours that Counter-Plaintiffs
4 estimated they would spend preparing for and attending the
5 hearing.

6 Finally, Counter-Plaintiffs have also shown that they
7 reasonably spent \$4,351.26 for expenses not included in the bill
8 of costs. Hwang Decl. ¶ 8 & Ex. D; Hwang Reply Decl. ¶ 7 & Ex. C.
9 As previously noted, B-Side has not challenged this amount. Thus,
10 the total reasonable attorneys' fees and costs awarded is
11 \$188,315.76.

12 CONCLUSION

13 For the reasons set forth above, the Court GRANTS Counter-
14 Plaintiffs' motion for attorneys' fees and costs (Docket No. 137).
15 Counter-Plaintiffs are entitled to \$188,315.76, payable within
16 fourteen days of the date of this Order.

17 IT IS SO ORDERED.

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19 Dated: 5/24/2013

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CLAUDIA WILKEN
United States District Judge